

THE EU FOREIGN SUBSIDIES REGULATION (FSR): A GAME CHANGER OR IMPOSSIBLE MISSION?

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Abstract

The negative effects of foreign subsidies granted to undertakings running business in the EU are becoming an increasing threat to the fair market competition on the EU market. These group of undertakings was not subjected to strict controls under the EU State Aid law. As a result, in 2023, the EU introduced the Foreign Subsidies Regulation (the FSR) to tackle distortions in the EU market caused by foreign subsidies granted to undertakings running business in the EU. The Regulation establishes a new regulatory framework for control of foreign subsidies in the EU market. Despite the good intentions and enthusiasm surrounding the implementation of the FSR, it is unclear whether the goals of the Regulation are realistic and feasible. The experts and market stakeholders are expressing concerns that the FSR is introducing an administrative overdose in the reporting on foreign subsidies and that it would ultimately reduce competitiveness in the internal market, because many undertakings will abandon large merger and acquisition transactions and public procurement proceedings due to bureaucratic obstacles.

This paper systematically analyses the provisions of the FSR and the accompanying legislative framework. The central part of the paper critically addresses the most significant regulatory solutions and the practical implications of the implementation of the FSR. In the final sections, the paper considers whether the new rules have accomplished their stated purpose and objectives, or whether it will ultimately be detrimental to the EU. Finally, the paper gives guidance on ensuring compliance with the provisions of the FSR.

Key words: Foreign subsidies, FSR, State Aid, Internal market, Competition Law.

1. INTRODUCTION

A fair market competition is one of the main EU policy objectives.¹ Therefore, undertakings operating within the EU are subject to strict controls of subsidies

¹ This paper was developed as part of the project of the Faculty of Law of the Josip Juraj Strossmayer University in Osijek titled no. IP-PRAVOS-10 - Contemporary tendencies in the development of Croatian civil justice; Erasmus+ Programme (ERASMUS), Call: ERASMUS-JMO-2021-HEI-TCH-RSCH, Project: 101047803 - Competition Law COE Erasmus+ Call 2023 – KA1 – Learning Mobili-

granted to them by EU Member States.² However, despite extensive normative regulation of State Aid, there was a legal gap for the control of foreign subsidies granted to undertakings running businesses in the EU, which were significantly disrupting the market competition.³ This is evidenced by the fact that there were undertakings participating in public procurement processes which were offering products and services under much more favorable prices (often dumping prices) because of the generous financial infusions granted by non-EU States, which allowed them to beat their competitors who did not receive such foreign subsidies, which significantly disrupted the market competition to the detriment of the end users, i.e. the consumers.⁴

The EU sought to fill this unfair situation in EU regulatory framework and considerable legal gap by adopting the FSR.⁵ In January 2023, the FRS entered into force and the provisions authorizing the European Commission (Commission) to initiate investigations followed on 12 July 2023, while in October 2023 entered into force the provisions on mandatory notice.⁶ The FSR introduces three powerful tools and authorities of the Commission: *ex-ante* notifications and reviews by the Commission in merger and acquisition transactions and in public procure-

ty of Individuals – Staff mobility for teaching and training activities at the Faculty of Law Universidad Nacional de Educación a Distancia in Madrid, Spain; Erasmus+ Call 2022 – KA1 – Learning Mobility of Individuals – Staff mobility for teaching and training activities at the University of Seville, Spain.

² Fox, E., M., Gerard, D., *EU Competition Law: Cases, Texts and Context*, Edward Elgar Publishing, Cheltenham, Northampton, Ma, Edward Elgar Publishing, 2023, p. 428. See also: Lowe, Ph., Yarak, S., *Closing the regulatory gap – answers (and new questions) from the Foreign Subsidies Regulation*, Competition Law & Policy Debate, Vol. 8, No. 1., 2023, pp. 23.

³ Stas, K., Geise, B., *The Foreign Subsidies Regulation of the European Union: A New Instrument Levelling the Playing Field?*, Global Trade and Customs Journal, Vol. 18, No. 10, pp. 360; Weiß, W., *The Regulation on Foreign Subsidies Distorting the Internal Market, A Path to a Level Playing Field?*, Springer, 2024., p. 1-5; Reinhold, Ph., Weck, Th., *Welcome to the Jungle! Identification of Foreign Subsidies Under the New EU Foreign Subsidies Regulation*, European State Aid Law Quarterly, Vol. 23, No. 1, 2024, p. 22; Werner, Ph., Barre, H., Music, K., Werner, Ph., Barre, H., Music, K., *Untangling the Foreign Subsidies Regulation*, CoRe, Vol. 8, No. 1, 2024, p. 23, Van Damme, I, *Understanding the Foreign Subsidies Regulation*, University of Bologna Law Review, Vol. 9, No. 1, 2024, p. 2; Blockx, J. Mattiolo, P., *The Foreign Subsidies Regulation: Calling Foul While Upping the Ante?*, Vol. 28, 2023, European Foreign Affairs Review, Issue SI, pp. 54, Wolski, J., S., *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, European State Aid Law Quarterly, Vol. 21, No. 2, 2022, pp. 153, Kociubinski, J., *The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?*, European Competition and Regulatory Law Review, Vol. 6, No. 1, 2022, pp. 57.

⁴ In that sense see: Weiß, W., op. cit. note 3, p. 1-5; Reinhold, Ph., Weck, Th., op.cit. note 3, p. 22; Werner, Ph., Barre, H., Music, K., op. cit. note 3, pp. 780.

⁵ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022, p. 1–45 hereinafter: the FSR.

⁶ The FSR ima prošireno djelovanje i može se primijeniti na strane subvencije dodijeljene čak i 5 godina prije navedenog datuma. Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 24.

ment processes, as well as the *ex-officio* investigations by the Commission.⁷ The Regulation was accompanied by its Implementing Regulation (IR)⁸ which governs the procedural aspects, particularly those related to the procedure for *ex-ante* notifications and reporting in merger and acquisition transactions and public procurement proceedings.⁹

During the year and a half since the FSR entered into force, over 100 pre-notification consultations were published in relation to merger and acquisition transactions, from which more than 70 led to a formal filing, which significantly exceeds the expected 30 cases per year.¹⁰ Therefore, it is a good time for an initial assessment of the *status quo* and guidance on the further implementation of the FSR. This paper critically analyzes the field of application and innovations introduced by the FSR with regards to (i) the notification and review of merger and acquisition transactions (i) and public procurement proceedings (ii), as well as conducting *ex officio* investigations by the Commission (iii). It provides a critical review of the most significant case law since the implementation of the FSR, and analyses whether it is truly an “administrative monster” as called by some scholars, or a necessary tool for the establishment of equality and transparency in the EU market.

2. THE SCOPE OF APPLICATION: WHO IS IN CHARGE?

2.1. Financial subsidies vs. financial contribution

The FSR expressly defines a foreign subsidy in several sections as a directly or indirectly financial contribution provided by a non-EU country to a specific undertaking or industry active in the internal market, through which such undertakings or industries gained advantages over their market competitors.¹¹ It is important here to distinguish foreign subsidies and financial contributions. If the FSR normative text is carefully observed, it is apparent that “foreign sub-

⁷ Reinhold, Ph., Weck, Th., op. cit. note 3, p.24. Werner, Ph., Barre, H., Music, K., op. cit. note 3, p.23.

⁸ Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, C/2023/4622, OJ L 177, 12.7.2023, p. 1–44.

⁹ In that sense see: Recital (10) and Art. 1 of the Implementing Regulation; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 23.

¹⁰ See: European Commission, The Foreign Subsidies Regulation – 100 days since the start of the notification obligation for concentrations, Competition FSR brief – The Foreign Subsidies Regulation – 100 days since the start of the notification obligation for concentrations, Available at: URL= <https://competition-policy.ec.europa.eu/publications_en> Accessed: 20 October, 2024.

¹¹ See Recital (2), (11), (13), Art 3(1) of the FSR.

sidey” is a broader term which must meet four cumulative criteria, i.e. it must be a financial contribution (*i*), granted by a third country to a specific recipient (*ii*) through which the recipient gained an economic benefit (*iii*) and that there is an element of selectivity (*iv*).¹²

2.2. Recipient and third country

When it comes to the recipients, the FSR does not elaborate the terms undertakings and industries in detail, but it is used on occasion in different sections of the FSR.¹³ For example, in the context of general definitions, Art. 3 (1) of the FSR defines undertakings as conducting economic activities in the EU with an objective of gaining profits, regardless of whether it is legally or factually one or more undertakings or industries.¹⁴ Further, Art 19 of the FSR provides that the control over market disruptions by foreign subventions in concentrations only covers the assessment of the foreign subventions granted within three years since the conclusion of the agreement, the publication of the public procurement, or meeting the control requirement.¹⁵ Furthermore, Art 27 of the FSR provides that, in the control over market disruptions in public procurement procedures, foreign subventions cover those granted within three years from the application for the procurement, which enabled the relevant undertaking to submit an unfairly favorable offer for the specific tender, compared to other applicants, particularly in terms of the price of goods, services and works.¹⁶

These provisions of the FSR and other EU State Aid law rules thus provide that a recipient is an undertaking which is economically active on the EU internal market, regardless of whether it is an EU or non-EU undertaking, and regardless of its legal form. This is also confirmed by literature in which the authors note that the term „undertaking conducting an economic activity“ in the context of the FSR overlaps with the meaning of „economic activity of undertaking“ developed in EU State Aid law.¹⁷

¹² Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 24; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 29.

¹³ See Recital (11), (14), Art 3(1) of the FSR, Art 19 and Art 27 of the FSR. Tako i: Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

See recital 11, Art 1(2), Art 3(1) and (2) of the FSR.

¹⁴ Art 3(1) of the FSR; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

¹⁵ Art 19 of the FSR.

¹⁶ Art 27 of the FSR.

¹⁷ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

When applied to the FSR, this means that, in the context of concentrations subject to the duty of notification, the recipient is any undertaking in the process of merger, acquisition or joint venture if at least one of the undertakings involved has its place of business within the EU and makes profits of at least 500 million EUR, or if they were granted a financial contribution over 50 million EUR from a third country, since the conclusion of the agreement, public procurement or the acquisition of controlling interest in: the acquiring undertakings and target (in case of an acquisition) or the companies entering a joint venture and the joint venture itself.¹⁸ In the context of public procurements, the recipient also includes undertakings which have received subventions granted to the main suppliers and subcontractors, although the formal filing obligations only apply to the relevant “economic operators”¹⁹

The meaning of “third countries” under the FSR is also unclear, but it can be concluded that the term should be broadly interpreted and that it refers to the subsidies granted from States which are not subject to EU State Aid law, since the purpose of the adoption of the FSR was to fill exactly such legal gaps.²⁰ A financial contribution must be granted by a third non-EU State, which is also broadly interpreted, so it can include subsidies by any government level of a non-EU State, regardless of whether it is the central, federal, regional, local or similar level, or any level of public authorities.²¹

Commentators warn that financial contributions granted by private entities should also be considered as foreign, if their actions can be attributed to the non-EU country.²² This position is based on the analogue application of EU State Aid law jurisprudence based on Art 107 (1) of the UFEU, according to which financial means are considered to originate from a third country if the foreign public authorities grant a financial benefit to certain undertaking, regardless of whether the granted funds are a permanent or temporary property of the public sector.²³

There is a shift which occurred with the implementation of the FSR, whose duties now apply to the undertaking recipient of the subvention, and not the Member

¹⁸ Art 20(3)b of the FSR; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

¹⁹ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

²⁰ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

²¹ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 25; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

²² Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

²³ Art 107(19) of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390, hereinafter: TFEU. Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

State,²⁴ which opens a number of legal questions. First of all, there is a legal uncertainty for undertakings since the FSR does not explicitly adopt the meaning of financial contributions from EU State Aid law, but this interpretation is based on analogy and the abovementioned elaborations by the relevant commentators.²⁵ Further, it is uncertain whether undertakings (regardless of whether they through concentration or public procurement) can always be expected to have all the relevant information, since the term of undertaking is broadly defined and it can be expected in some cases that the entities will not be able to provide such information under national law.

There is even the question of whether the relevance and accuracy of such information can be verified, when obtained, whether the amount and scope of information will be sufficient, or if many undertakings will give up on economic activities in the internal market, due to the previously mentioned administrative barriers.²⁶

2.3. Economic benefit

The economic benefit is an element which arises out of recital 13 of the FSR, which refers to conferring “a benefit on an undertaking if it could not have been obtained under normal market conditions”.²⁷ This provision implies that the so-called “market economy operator test” developed under EU State Aid law also applies,²⁸ i.e. it is relevant whether the foreign subsidy was granted as part of the regular market conditions, or if it creates an economic benefit for a specific undertaking.²⁹ To facilitate the determination of an economic benefit, the FSR introduces the presumption of a high likelihood that the foreign subsidy granted to the undertaking in distress will cause a market disruption if the State guarantees for the obligations of the undertaking, if the undertaking was granted a loan under conditions more favorable than those on the market, if the foreign subsidy facilitates the concentration of undertakings, etc.³⁰ The time of the economic benefit is the moment when the beneficiary acquires the right to receive the foreign subsidies.³¹

²⁴ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 23.

²⁵ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 24.

²⁶ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

²⁷ Recital 13 of the FSR.

²⁸ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 31 and Commission Notice on the notion of State aid as referred to in art 107(1) of the Treaty on the Functioning of the European Union' [2016] OJ C 262/1 para 73-114.

²⁹ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 26.

³⁰ Art 5(1) and (2) of the FSR.

³¹ Recital (15) of the FSR and Reinhold, Ph., Weck, Th., op. cit. note 3, p. 31.

2.4. Selectivity

According to Art 3(1) of the FSR, foreign subsidies must be granted to special undertakings or industries, which implies the selectivity in the choice of recipients. This excludes general measures of universal application to all undertakings, sectors and industries. Such a selectivity can be proved based on the law or facts.³² In other words, the determinative factor is whether the third-country favored only certain undertakings, sectors or industries, or the selectivity resulted from the use of such foreign subsidies. Different criteria may apply in this context, even if the foreign subsidies were granted based on the size of the undertaking.³³

3. NOTIFICATION AND REVIEW BY THE EUROPEAN COMMISSION

The FSR introduces the duty of notification in merger and acquisition transactions and public procurement procedures if they exceed the prescribed thresholds, including the duty to submit signed FS-CO and FS-PP respectively, and suspend the merger and acquisition transactions and public procurement procedure pending approval by the Commission.³⁴ Notifications are made through the submission of the FS-CO form. The procedure for the notification and the information relevant for the Commission is provided in the IR which entered into force on 10 July 2023 along with 2 Annexes, which provides detailed procedural provisions related to the FSR, the notification forms for merger and acquisition transactions (FS-CO forms) and public procurement procedures (FS-PP forms).³⁵

3.1. Notification and review in merger and acquisition transactions

The FSR provides the criteria (thresholds) related to the turnover and financial contribution which must be cumulatively met in order for undertakings to be subject to the duty to notify the Commission on their merger and acquisition transactions.³⁶

³² Reinhold, Ph., Weck, Th., op. cit. note 3, p. 31

³³ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 31-32.

³⁴ U tom smislu vidi odredbe FRS and Implementing Regulation.

³⁵ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 25.

³⁶ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 26-27; ; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 25; Stas, K., Geise, B., op.cit. note 3, p. 364 and 366. See also: Johannes, B., *The Regulation on Foreign Subsidies Distorting the Internal Market: An Introduction and a Critical Discussion of the Rules on Concentrations*, Zeitschrift für Öffentliches Recht (ZoR): Journal of Public Law, Vol. 78, No. 2, 2023, pp. 228.

With regards to the turnover, related to an acquisition target, in case of a merger of one of the parties or for the creation of a joint venture in the internal market, the first FSR threshold is related to the previous financial year and it is minimum €500 million.³⁷ When it comes to financial contributions, the FSR provides that the undertakings also have to meet the second threshold of: "...over €50 million granted in the three years prior to the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest."³⁸ It is important to note that undertakings which were granted foreign subsidies are subject to these thresholds, regardless of whether the recipients are the acquiring entity or the target, the merging entities, or the undertaking included in joint venture themselves, or their parent undertakings.³⁹

The IR provides an exception from the notification duty in cases of *de minimis* foreign financial contributions, which must be notified only if they are singular foreign financial contributions in the amount of 1 mil EUR or more, and falls under the category of foreign subsidies which are likely to lead to market disruptions.⁴⁰

After the submission of the notification, the Commission conducts the initial review of twenty-five days, which is followed by an in-depth review during ninety working days, if the relevant conditions are met. This can be extended for another period of fifteen days.⁴¹

It is important to note that there is a standstill obligation following the submission of the notification pending the decision of the Commission.⁴² Therefore, undertakings running business in the EU must be aware of the FSR and its implementing norms largely change the planning of merger and acquisition transactions.⁴³ The preparation of the transaction itself now must include the FSR compliance, i.e. the notification of foreign financial contribution, along with the usual merger control.⁴⁴ In other words, in merger and acquisition transaction procedures this means that the obligations prescribed by the FSR now have to be foreseen and considered in advance in terms of the fees, guarantees, the time needed to obtain

³⁷ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 26-27; Stas, K., Geise, B., op.cit. note 3, p. 364-365.

³⁸ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 26-27; Stas, K., Geise, B., op.cit. note 3, p. 364-365.

³⁹ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 24;

⁴⁰ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 26.

⁴¹ Stas, K., Geise, B., op.cit. note 3, p. 367.

⁴² Art. 24 (1) of the FSR. Stas, K., Geise, B., op.cit. note 3, p. 364.

⁴³ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 25.

⁴⁴ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 25.

the approval of the Commission now need to be taken into account in advance, and FSR compliance must be a part of due diligence.⁴⁵

In addition, the Commission has the right to require the notification of any potentially distortive transactions of which it was not notified, regardless of whether they meet the abovementioned thresholds for mandatory notification.⁴⁶ This is provided by the FSR from the experiences in merger controls under Art 22 of the EC Merger Regulation.⁴⁷ These experiences revealed that there are merger and acquisition transactions which, despite the good normative framework, remain unverified. The same regime has now been extended to control over foreign subsidies, in what seems to be a stricter form. Namely, although Art 22 of the EC Merger Regulation has faced fierce criticism and resistance, Art 21(5) of the FSR provides that the European Commission can require prior notification in cases of doubt that a foreign subsidy was granted within the past three years, which is not a notifiable concentration within the meaning of Article 20.⁴⁸

The notification duty is often called an overdose of administration for undertaking.⁴⁹ Many authors and the business community warn of an overdose of administration for the undertakings. Many undertakings are complaining of both the complexity of the information which must be collected and the fact that anybody can notify a foreign subsidy at any time, which may obstruct undertakings which have received them under normal market conditions. This can be considered a cross-notification, which will only create difficulties and burdens for the Commission.⁵⁰

3.2. Notification and declaration in public procurement procedures

The FSR provides the criteria (thresholds) related to contract values, or lots if the tender is divided into lots, and foreign financial contribution which must be contractually met by undertaking to qualify for the notification duty towards the Commission, if they are engaging in a public tender.⁵¹

⁴⁵ Tako slično i: ; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 25.

⁴⁶ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

⁴⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), *OJ L 24*, p. 1–22; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 28.

⁴⁸ Arts. 20, 21(5) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 28.

⁴⁹ Stas, K., Geise, B., op.cit. note 3, p. 34.

⁵⁰ Stas, K., Geise, B., op.cit. note 3, p. 34.

⁵¹ Art 28(1) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 29 and 36.

In terms of the contract value, the FSR provides that undertakings participating in public procurement must fill the FS-PP form if the contract is worth €250 million or more. The notification duty obligation arises where a foreign subsidy contribution was granted by a third country even three years ago, in the amount of €4 million or more.⁵² It is important to note here that the notification duty also extends to the subsidiaries, all contractor suppliers, all companies in holding of the bidding party.⁵³ The parties in the process of public procurement which do not meet the prescribed thresholds still have to declare any received foreign subsidies more than 4 million EUR per foreign country.⁵⁴

Even undertakings which have not received foreign financial contributions must submit a summary list of the participants in the public procurement process, a description of the process and a list of any granted foreign financial contributions, and a declaration that have not received any contribution subject to the FSR duty to notify the Commission.⁵⁵ The duration of the initial review in public procurement procedures is twenty days, with possible extension of ten days.⁵⁶

Numerous authors have warned that the abovementioned FSR administrative duties are an additional burden in an already complicated public tenders, because many bidders may give up on their participation, and potentially miss out on prevailing on a tender because they have received a subsidy, or if they are disqualified because of non-compliance because they have not obtained the approval from the Commission.⁵⁷

Other than the concerns relevant for merger and acquisition transactions, there are additional risks in public procurement processes because the administrative burden is large and incomparable in practice.⁵⁸ As a result, potential bidders may give up on applying to public tenders, thus reducing the competitiveness of all bidders, and it can additionally prolong the procedure due pending the decision of the Commission.⁵⁹ In our view, the notification of foreign subsidies should be limited only to those which are likely to be detrimental to the market competi-

⁵² Art 28(1) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 29.

⁵³ Art 28(1) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 29.

⁵⁴ Art 28(1) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 29.

⁵⁵ Art 28(1) and 29 of the FSR; Art 28(1) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 29 and 30.

⁵⁶ Art. 30, 31 and 32 of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

⁵⁷ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

⁵⁸ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36; Stas, K., Geise, B., op.cit. note 3, p. 370-371.

⁵⁹ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 37; Stas, K., Geise, B., op.cit. note 3, p. 370-371.

tion.⁶⁰ Furthermore, the duty to declare cases under the mandatory notification threshold should be relaxed, since the large administrative burden will reduce the competitiveness of notifiable bidders in public tenders, which will ultimately spill over to the State which will have to pay larger amounts for worse offers. In addition, the qualitative criteria defining the terms “main subcontractor” and “main supplier” should be removed.⁶¹

3.3. Powers of the European Commission

The authority of the Commission under the FSR is expansive, including the right to request and examine information from any source, regardless of whether it is for a specific undertaking, competitors, EU Member States or non-EU member States and conduct inspections inside and outside the EU.⁶² This creates potential risks and it is recommended that the Commission issues guidelines for complaints in order to avoid the frustration of the purpose of the FSR, and focus on distortive foreign subsidies.⁶³

It should be noted here that the review by the Commission regarding foreign subsidies is divided into 2 phases.⁶⁴ The first phase consists of the preliminary review which investigates whether the foreign financial contribution has distorted competition in the internal market. If such indications are found in the initial review phase, the Commission can initiate an in-depth investigation.⁶⁵

During this investigation, there are three-fold review: “...1. whether the foreign financial contribution actually distorted or 2. threatens to distort competition on the internal market, and if so, 3. what is the extent of such distortion to competition in the internal market.”⁶⁶ The analysis in the in-depth review is conducted on a case-by-case basis.⁶⁷

The first assessment determines the real or potential detriment caused to competition on the internal market.⁶⁸ This includes whether the foreign financial contri-

⁶⁰ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 37; Stas, K., Geise, B., op.cit. note 3, p. 370-371.

⁶¹ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 37; Stas, K., Geise, B., op.cit. note 3, p. 370-371.

⁶² Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 37; ; Stas, K., Geise, B., op.cit. note 3, p. 370-371; Lopez, J, Piernas, J., op. cit. note 3, 2024, p. 85.

⁶³ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 37; Stas, K., Geise, B., op.cit. note 3, p. 370-371.

⁶⁴ Art. 10 of the FSR and Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 32.

⁶⁵ Art. 35 of the FSR.

⁶⁶ Recital (1) and Art. 10 of the FSR and Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

⁶⁷ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 32.

⁶⁸ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 32.

bution has distorted the competition on the market, regardless of the recipient, i.e. whether the foreign subsidy selectively targeted certain undertakings on the market over others, putting them in a better position from their competition, thus actually or potentially distorting the competition on the internal market.⁶⁹ It is worth noting here that not only real, but also potential distortions fall under the scope of the FSR. In other words, there needs to be a finding that there was a foreign subsidy which placed the position of an undertaking compared to its competitors, which had a real or potential negative effect on the market competition.⁷⁰

When assessing the real or potential negative effects, the FSR allows the Commission the possibility of applying a balancing test in order to juxtapose the negative with the positive effects of foreign financial contributions.⁷¹ If there is a finding of real or potential negative effects arising from the foreign financial contribution, the Commission applies a balancing test to weigh each respectively.⁷² This balancing test helps the Commission in assessing whether or not to proceed to the next stage if it finds a prevalence of negative over positive effects, or whether it will take no action if there is a prevalence of positive effects.⁷³

Indicators for the determination of the negative effects are the size of the undertaking, the amount, purpose and form of the subsidy, the recipient's economic status, the circumstances in the sector or industry within which the undertaking operates, etc. The FSR introduces a presumption that: "the foreign subsidy is unlikely to distort the internal market when the total subsidy to a company over 3 consecutive years is below €4 million; further, they do not distort the internal market when: the total subsidy to a company over 3 consecutive years is below the EU *State aid de minimis* threshold (€200,000), or when the aid is used to help recover from damage caused by natural disasters or exceptional events."⁷⁴

After the in-depth investigation, the Commission can conclude that everything is in order, determine commitments or remedial measures, or prohibit the merger and acquisition transaction, or the award in a public tender, or issue a decision prohibiting the merger and acquisition transaction or award in a public procurement proceeding.⁷⁵

⁶⁹ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 32; Art. 4(1) of the FSR.

⁷⁰ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 33-34.

⁷¹ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 33.

⁷² Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 33.

⁷³ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 34.

⁷⁴ Art 4 of the FSR. Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 34.

⁷⁵ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36-37.

It is interesting that, unlike the rules on concentrations, the FSR allows the Commission to approve an merger and acquisition transaction which would otherwise be prohibited by balancing the positive and negative effects of the foreign subsidy.⁷⁶ The Commission has broad discretionary power at this stage of the investigation. Such a broad and uncertain authority of the Commission has been widely criticized as it creates significant legal uncertainties for the undertakings because there are no clear measures or criteria on whether and to what extent positive effects need to be linked to merger and acquisition transactions or public tenders.⁷⁷ The FSR provides examples of such positive effects, including environmental protection, digital transformation, social categories, and the promotion of development and research.⁷⁸ If the negative effects prevail over the positive effects, the Commission can prohibit the merger and acquisition Transaction or the participation of the undertaking in the public procurement proceedings, or impose redressive measures or commitments to the undertaking to remedy the distortion in the internal market.⁷⁹

it is recommended that the undertakings are aligned with the FSR requirements with minimal burden to their operations by expanding the existing data collection systems to agreements, subsidies, grants, and tax benefits and supporting evidence if such a subsidy was granted through a transparent competition under normal market conditions.⁸⁰

4. EX-OFFICIO REVIEWS

In addition to the mandatory notifications for merger and acquisition transactions and notifications and declarations in public procurement procedures, the FSR introduces the *ex officio* review which the Commission can initiate for recipients of foreign subsidies.⁸¹ The *ex officio* review is a powerful tool the FSR provides to the Commission and it can be initiated to cases meeting the requirements for the notification obligation in merger and acquisition transactions and the notification and declaration duty in public procurement procedures, but also in cases where the abovementioned requirements were not met if the Commission considers that

⁷⁶ Stas, K., Geise, B., op.cit. note 3, p. 367.

⁷⁷ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 33.

⁷⁸ Art 21 of the FSR and Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 33.

⁷⁹ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 32-34.

⁸⁰ Reinhold, Ph., Weck, Th., op. cit. note 3, p. 31.

⁸¹ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

the undertaking has received a financial contribution which has distortive effects on the internal market (so-called *ad hoc* notifications).⁸²

Consistent with the mandatory notification and *ex-officio* review, if there is a finding of sufficient indicators that the foreign submission has caused market distortions in the preliminary review, the Commission can initiate an in-depth investigation.⁸³ During the preliminary review, the Commission also has the right to request the submission of all information from the undertakings and other implicated parties (competitors, Member States, non-Member States, sub-contractors, Associations, authorities, etc.).⁸⁴

In this phase, the Commission is not obliged to notify the undertakings of the conducted preliminary review, unless the available collected information already indicates that the granted foreign subsidies cause distortions on the internal market.⁸⁵ The duration of in-depth investigations is not limited, and they should not exceed 18 months under the FSR.⁸⁶ Upon the conclusion of an in-depth review, as is the case for merger and acquisition transactions and public procurement procedures, the Commission can issue an objection decision, a decision with redressive measures and a decision with commitments from the company at stake.⁸⁷

Just like the earlier authorizations of the Commission, this authorization was met with various criticisms from the academic and business communities, as the large administrative burdens imposed on the undertakings introduces another powerful discretionary tool of the Commission.⁸⁸ Namely, the discretionary assessments of the Commission in the abovementioned situations is minimally restricted with the proportionality principle and general principles of EU law, but many have warned that the Commission had previously shown a tendency to exceed its authorities.⁸⁹

The Commission has the right to conduct *ex-officio* reviews of foreign subsidies within 10 years since such a subsidy was granted to an undertaking, noting that each investigation interrupts this limitation period, which starts afresh after each interruption.⁹⁰

⁸² Art. 9. of the FSR. Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 30.

⁸³ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36, Art. 10 of the FSR.

⁸⁴ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

⁸⁵ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

⁸⁶ Art. 11(5) of the FSR.

⁸⁷ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

⁸⁸ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 30-31.

⁸⁹ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 30-31.

⁹⁰ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

Authors caution that it can be expected that it will take some time until the Commission adapts to the implementation to the implementation of the FSR and reviews all the *ex-ante* notifications, since this will require large efforts and staff capacities.⁹¹ This means that it will have time for in-depth investigations only thereafter.⁹² It was also noted that such *ex-officio* reviews will be initiated mostly upon notifications by market competitors, since they will have the largest interest in the investigation of illegal foreign subsidies.⁹³ They further note that other *ex-officio* reviews will arise from information provided to the Commission in the forms submitted in the aforementioned notifications and notifications by the Member States,⁹⁴ or based on otherwise available market investigators.⁹⁵ The FSR does not provide for any procedure based on unofficial complaints, i.e. there are no deadlines for the Commission's opinion on the complaint, nor does the complaining party have a right to a status review and final decision on the application to the Commission.⁹⁶

5. CASE LAW OVERVIEW OF THE FIRST ONE AND A HALF YEAR OF THE APPLICATION OF THE FSR

5.1. Statistics and general overview

According to the data published for the first year of the FSR application, there were 106 pre-notification consultations regarding merger and acquisition transactions, 76 of which led to a formal filing.⁹⁷ The Commission initiated four in-depth investigations after mandatory notifications related to one merger and acquisition transaction, three related to public procurement proceedings and two *ex officio* reviews.⁹⁸

The subjects of initial reviews were largely Chinese undertakings active on the internal market, but further activities showed that the Commission was not only focused on China, but also other third countries.⁹⁹

⁹¹ For some open question see: Morris, S., *The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions*, European State Aid Law Quarterly (ESTAL), Vol. 21, No. 2, 2022, pp. 143.

⁹² Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

⁹³ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

⁹⁴ See Arts. 9(1) and 35(2) of the FSR.

⁹⁵ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

⁹⁶ Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

⁹⁷ European Commission, *The Foreign Subsidies Regulation – 100 days since the start of the notification obligation for concentrations, Competition FSR brief*, Available at: URL= <https://competition-policy.ec.europa.eu/publications_en> Accessed: 20 October, 2024.

⁹⁸ Ibid..

⁹⁹ Ibid.

5.2. In-depth investigations

The first in-depth investigation started in February 2024, in relation to a Bulgarian railway public tender, based on a notification of one of the bidders of the CRRC, a Chinese train producer. The process ended with the withdrawal of the Chinese undertaking.¹⁰⁰ Soon thereafter, in April 2024, the Commission initiated two additional in-depth investigations in the process of bid collection for a Romanian solar photo park public for two Chinese undertakings - LONGi Solar Technologie and Shanghai Electric. The Chinese undertakings withdrew in this case as well due to the in-depth investigations conducted by the Commission.¹⁰¹

In the field of merger and acquisition transactions, the first in-depth investigation was conducted for an merger and acquisition contract for acquisition between a telecoms operator from the United Arab Emirates (UAE) of a Telecom Group by Emirates Telecommunications and the Czech PPF Telecom Group which operate on the Bulgarian, Hungarian, Serbian and Slovakian markets. Following the conclusion of the in-depth investigation on 30 September 2024, the Commission conditionally approved the mentioned acquisition, in accordance with the FSR, stating that there is a risk of distortion which could be remedied with the commitments imposed on the parties.¹⁰²

5.3. Ex-officio reviews

In April of 2024, the Commission initiated reviews of Chinese suppliers of wind turbines due to the more favorable prices and financing conditions they offered.¹⁰³ At the end of April 2024, the Commission used its authority to initiate an unan-

¹⁰⁰ European Commission, *Commission opens first in-depth investigation under the Foreign Subsidies Regulation*, 2024; /2024/1913. Available at:URL= <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_887> Accessed: 20 October; European Commission, *Summary notice concerning the initiation of an in-depth investigation in case FSP100147 pursuant to Articles 10(3)(d) of Regulation (EU) 2022/2560*, Available at:URL= < ELI: http://data.europa.eu/eli/C/2024/1913/oj > Accessed: 20 October, 202. For more see also: Yarak, S., Robins, N., Couto, F., Marengon, M., *Assessing the Practical Implications of the Foreign Subsidies Regulation - Revisiting the Acquisition of Vossloh Locomotives by CRRC*, Economic Focus Competition Law Journal, Vol. 22, No. 4, 2023, pp. 200-207.

¹⁰¹ European Commission, *Commission opens two in-depth, op.cit. (note 111)*. It is interesting what exact has the FSR on the Eu football market, for more see: Trapp, P., Vollert, Ch., M., , *European State Aid Law Quarterly*, Vol. 23, No. 1, 2024, pp. 56-61

¹⁰² European Commission, *Summary notice op.cit. note 111*.

¹⁰³ Case T284/24 R, Nuctech Warsaw Company Limited sp. z o.o., established in Warsaw (Poland), Nuctech Netherlands BV, established in Rotterdam (Netherlands) v European Commission [2024], ECLI:EU:T:2024:564. For China perspective on the FSR see also: Liying, Zh., *The European Union's New Anti-Subsidy Policy as per the Regulation on Foreign Subsidies, WTO Journal of WTO and China*, Vol. 13, Issue 2 (2023), pp. 29.

nounced control and conducted a raid of the Dutch and Polish business premises of the Chinese company for security scanners Nuctech.¹⁰⁴ The Commission was acting upon a notification alleging that the undertaking was submitting false information on subsidies, which allowed them to prevail over their competitors in EU tenders.¹⁰⁵ Soon thereafter, in May 2024 Nuctech filed an appeal and requested a temporary prohibition of sharing Nuctech's information, and the annulment of the Commission's decision,¹⁰⁶ claiming alleging that it is illegal and contrary to Nuctech's due process rights. The first instance court rejected the appeal in August 2024 and affirmed the decision of the Commission, finding that the relevant investigation and the authority of the Commission in the relevant case arose out of the FSR.¹⁰⁷

5.4. Summary

In conclusion, the initial implementation of the FSR was filled with growing pains and learning along the way and growing pains in order to remove the uncertainties in its interpretation and its proper application. It is expected that the remaining uncertainties will be removed by January 2026, when the substantive analysis guidelines must be published.¹⁰⁸ It appears that the protection of EU interests and the focus on Chinese undertakings are having increasingly negative effects on the trade between the EU and China.¹⁰⁹ The Chinese Chamber of Commerce (CCCEU) and vocally criticizing the application of the FSR by the Commission, treating it as a targeted obstruction of the operations of Chinese undertakings in

¹⁰⁴ Case T284/24 R, op. cit. (note 103).

¹⁰⁵ Case T284/24 R, op. cit. (note 103).

¹⁰⁶ Case T284/24 R, op. cit. (note 103).

¹⁰⁷ Case T284/24 R, op. cit. (note 103).

¹⁰⁸ Reinhold, Ph., Weck, Th., *op.cit.* note 3, p. 34. See also economic aspects of the FSR and its application on the EU market: Claici, A., Davis, P., Dijkstra, G., *Theories of Harm in the Implementation of the Foreign Subsidies Regulation*, European Competition and Regulatory Law Review, Vol. 8, No. 1, 2024, p. 4. see also: Hornkohl, L., *The Role of Third Parties in the Enforcement of the Foreign Subsidies Regulation: Complaints, Participation, Judicial Review and Private Enforcement*, The EU Foreign Subsidies Regulation Competition Law & Policy Debate, Vol. 8, No. 1, 2023, pp. 32; Su, Xueji, S., *A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?*, Legal Issues of Economic Integration, Vol. 50, Vol. 1, 2023, pp. 68.

¹⁰⁹ China Chamber of Commerce to the EU (CCCEU), *CCCEU Statement on EC's FSR in-depth probes*, Available at: URL= <http://en.ccceu.eu/2024-04/23/c_4218.htm> Accessed: 20 October, 2024. See also for international context: Vassilis, A., Blancardi, J., B., *Analysis of the Foreign Subsidies Regulation from an International Trade Law Perspective on Trade in Goods*, Global Trade and Customs Journal, Vol. 18, No. 10, 2023, pp. 383; Keer, H., *Research on the Regulation of Outward Foreign Direct Investment Subsidies*, *Commentaries China Legal Science*, Vol. 12, No. 2, 2024, pp. 132.

the EU¹¹⁰ This resulted in a concrete response when the Chinese Ministry of Trade (MOFCOM) announced that it was considering requests for a counter-response to the FSR on 27 June 2024. In addition, Chinese undertakings are urging its government to impose a variety of levies on EU exporters of agricultural products to China, as a response to the selective discriminatory application of the FSR by the Commission.¹¹¹

6. CONCLUSION

The FSR introduces a lot of novelties concerning foreign subsidies and their negative effects on the EU internal market. This includes additional notification obligations imposed on undertakings prior to engaging in large merger and acquisition transactions and participating in public tenders. Furthermore, the FSR introduces a review process of mentioned notifications, as well as the possibility of initiating ex-officio review by the Commission.

Despite the good intentions and enthusiasm surrounding the implementation of the FSR, the expansive authority of the Commission are largely criticized by the expert and business communities, as the Commission has a large and unclear discretion to assess notifications and to launch investigations in its discretion at any time.

Many authors and the business communities are concerned about an overdose of administration imposed on the undertakings by the FSR. Market participants are complaining of both the complexity of the information which must be collected, and as well as the fact that anybody can falsely report that there is a foreign subsidy at any time without any consequence and exclude the competitors from the public tenders and large merger and acquisitions transactions. Another concern in the public procurement process is that its competitiveness may be reduced in practice, due to the disproportionate administrative burden. As a result, some potential bidders may not apply to the tender, thus reducing the competitiveness of all bidders and extending the whole process pending the Commission's decision, ultimately increasing the costs paid by the States to the winners of the public procurement, since a fewer number of competitors will apply with lower offers.

Next, it is recommended that the undertakings comply with the FSR requirements while minimising the burden on their operations by expanding the existing

¹¹⁰ China Chamber of Commerce to the EU (CCCEU), op.cit. (note 109).

¹¹¹ China Chamber of Commerce to the EU (CCCEU), *CCCEU Statement on EC's FSR in-depth probes*, Available at: URL= <http://en.ccecu.eu/2024-04/23/c_4218.htm> Accessed: 20 October, 2024.

data collection systems to agreements, subsidies, grants, and tax benefits that fall into the category of foreign subsidies under the FSR.

Furthermore, it is recommended for the Commission to publish, as soon as possible, clearer guidance for complaints, clarifications on the notification process and clearer rules on the definition of foreign subsidies. Considering the preliminary results of the application of the FSR, it is recommended to limit the notification of foreign subsidies only to those which are most likely to disrupt the market competition. Additionally, the duty to declare in cases below the notification's thresholds should be relaxed, since a large administration will reduce the competitiveness of bidders in public procurement processes, causing a spillover to the State which will ultimately have to pay more for lower bids. Furthermore, the removal of the criteria for defining the main subcontractor and main supplier should be reconsidered.

In conclusion, the initial implementation of the FSR was characterised by challenges and learning process aimed to eliminate the uncertainties in its interpretation and its proper application. It is expected that the remaining uncertainties will be removed by January 2026, when the substantive analysis guidelines must be published. Until then, as things currently stand, the FSR fills important gaps and has produced satisfactory initial results, but it remains to be seen whether it will meet its objectives over the years, or if the FSR will further hinder the fair market competition and make the EU single market less attractive.

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